

The ALJ found that claimant sustained a compensable injury to his left heel in the form of an increase in pain and numbness as a result of his work duties for respondent. And that based on the medical testimony of Dr. Murati claimant is entitled to a 21 percent permanent partial impairment of function to his left lower leg. In doing so, the ALJ rejected

claimant's (and Dr. Murati's) contention that his left foot injury led to an altered gait which gave rise to right knee and low back complaints.

Claimant requests review of this decision contending the Board should find the claimant bears a whole person impairment and resulting work disability based on the opinions of Dr. Murati and vocational specialist Jerry Hardin. Accordingly, claimant maintains he is entitled to an 85 percent work disability based on a 70 percent task loss and a 100 percent wage loss as he is unable to work due to his work-related injuries.

Respondent argues that claimant failed to establish that he sustained an accidental injury arising out of and in the course of his employment. Put simply, respondent believes the medical testimony indicates that claimant's left foot condition is idiopathic in nature and was not aggravated or caused by his work activities. Alternatively, assuming claimant sustained a work-related injury, respondent maintains claimant's permanent impairment is limited to the 21 percent to his left foot. And even if claimant sustained a whole body impairment as a result of his condition, that he is nonetheless not entitled to a work disability award as he is capable of earning a comparable wage. Thus, the ALJ's Award should be modified to reflect an impairment to the left foot only.

The only issues to be resolved in this appeal are whether claimant sustained an accidental injury arising out of and in the course of his employment and if so, the nature and extent of claimant's impairment, including work disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The underlying facts of this case are not in dispute. Claimant was employed as a traveling tool salesman. This job required claimant to load and unload merchandise from the tractor trailer, set up displays, maintain inventory, stock the trucks and maintain records and tickets of sales. Claimant testified that he would be on his feet for most of the day walking on hard surfaces.

In February 2002, claimant began to notice pain and discomfort in his left heel. This pain continued to get worse over time. Claimant was referred to Dr. LeCorps in Clinton, Oklahoma in March 2002, and was diagnosed with a heel spur. On March 11, 2002, Dr. LeCorps, performed a fascial release and rasping of the heel spur. Physical therapy followed, but claimant indicated this treatment did not help relieve his complaints.

His care was then transferred to a Dr. Daniel Jones who, on May 28, 2002, diagnosed plantar fasciitis. Dr. Jones imposed restriction and recommended shoe inserts. Thereafter, claimant's care was transferred to Dr. Langerman. On July 16, 2002, Dr.

Langerman recommended a procedure using high pulsed ultrasound to break up scar tissue. This procedure was performed on August 23, 2002, but was unsuccessful. He then performed an additional fascial release and a decompression of the first branch of the posterior tibial nerve to the heel. Again, claimant had physical therapy, but his complaints did not improve. Dr. Langerman released claimant to return to work with restrictions. Claimant testified that as of this time, no other body parts were hurting.¹

Claimant was then examined by Dr. Pedro Murati on May 22, 2003, at the request of his attorney. Dr. Murati diagnosed left foot pain secondary to causalgia, possible CRPD, left foot pain secondary to status post multiple surgeries, right knee pain secondary to patellofemoral syndrome secondary to overuse; and low back pain secondary to antalgia with signs and symptoms of radiculopathy.² Dr. Murati recommended further treatment which led to a referral to Dr. James E. Winslow.

Dr. Winslow saw claimant beginning September 2003 and diagnosed heel pain, right knee and low back pain. He indicated claimant's plantar fasciitis presents in the classical fashion, with a slow onset and pain gradually increasing. Dr. Winslow testified that plantar fasciitis is an idiopathic condition,³ and while claimant's job activities did not produce his foot complaints, they may have aggravated his discomfort. And he testified he thinks claimant's job did not permanently change the condition of claimant's foot.⁴

Dr. Winslow evaluated claimant's back complaints and ordered a MRI and an EMG, both of which were negative. Dr. Winslow indicated that it was difficult for him to conduct a proper examination of claimant's back because the claimant stood with his right heel on the ground and his left heel 3-4 inches off the ground with his hip and knee flexed. He indicated that based upon his examination of claimant's back he found no neurological impairment to the back.

Dr. Winslow also examined claimant's right knee, with the aid of a MRI and x-rays. These films revealed osteoarthritis and showed that claimant's anterior cruciate ligament (ACL) was abnormal, in that the ACL appeared to have been torn, but claimant could relate no injury that would account for the tear. Dr. Winslow testified that neither the osteoarthritis in the knee or the abnormal ACL were caused by an abnormal gait brought on by claimant's left foot condition.⁵

¹ R.H. Trans. at 15.

² Murati Depo., Ex. 2 at 2 (May 22, 2003 Report).

³ Winslow Depo. at 18.

⁴ *Id.* at 19.

⁵ *Id.* at 27-28.

Dr. Winslow released claimant and rated him at 50 percent permanent impairment to the left foot, although he concluded claimant's impairment was not caused by his employment.⁶ He declined to assess any impairment to the low back or the right knee.

Then, on April 15, 2004, claimant was again examined by Dr. Murati. Dr. Murati testified that claimant's left foot condition caused him to favor that side, thus giving rise to his right knee condition, aggravating the ACL abnormality and both these conditions combined to produce his low back pain.⁷ He imposed permanent restrictions of no climbing stairs or ladders, no squatting, crawling, kneeling, driving a manual, no repetitive foot controls with the right or the left, no lifting, carrying, pushing or pulling over 10 pounds, rarely stand, walk, bend, crouch or stoop, occasional lifting, carrying, pushing and pulling 10 pounds and frequent lifting, carrying, pushing and pulling 5 pounds. Claimant was to alternate sitting frequently, alternate standing and walking, and no lifting below knuckle height.⁸

Dr. Murati assigned to claimant a 5 percent impairment of the left lower extremity for a decrease in sensation along the left saphenous nerve distribution, a 17 percent of the left lower extremity for loss of range of motion of the left ankle. These combine for a 21 percent to the left lower extremity which converts to a 8 percent whole person impairment. For the patellafemoral syndrome of the right knee a 5 percent impairment of the right lower extremity was assigned, a 17 percent impairment of the right lower extremity was assigned for modern laxity of the right knee, 9 percent impairment was assigned for right calf atrophy, for right thigh atrophy 4 percent to the right lower extremity was assigned. These combine for a 31 percent impairment to right lower extremity and converts to a 12 percent whole person impairment. For the low back pain claimant was assigned a 10 percent whole person impairment. These whole person impairments were then combined for a 21 percent whole person impairment.

Respondent referred claimant to Dr. Jeffrey MacMillan on August 26, 2004, for a final impairment rating. Claimant saw Dr. MacMillan and complained of left heel pain so tender that he could not bear weight on it, and when he did it felt like he was walking on needles. He told the doctor that if he walked on his tip toes he could walk a little bit for short distances. Claimant also indicated that as a result of having to use crutches he now has right knee pain. He also complained of low back pain which he related to walking with the crutches and hobbling on his left foot. Claimant told the doctor that he could not sit or walk for long periods because his back pain was severe. He also indicated that these symptoms came on over time, nothing specific happened to cause his heel pain.

⁶ Unless otherwise noted, all ratings are to the 4th edition of the A.M.A. *Guides*.

⁷ Murati Depo. at 7-8.

⁸ *Id.*, Ex. 3 at 5 (4/15/04 report).

After a physical exam, Dr. MacMillan opined that claimant had an ACL deficient right knee,⁹ chondromalacia patella right knee, osteoarthritis right knee, low back pain, and chronic left heel pain.¹⁰ He recommended that claimant have a arthroscopic examination and right knee debridement, and a lumbar MRI.

Following his examination, Dr. MacMillan noted the following:

Although Mr. Stephenson complains of severe disabling left heel pain, the wear on his shoe does not appear consistent with one who is only weight bearing on his forefoot, as Mr. Stephenson demonstrated in the office today. In terms of treatment for his foot pain, a foot has to do two things: 1.) It has to fit into a shoe ["no shirt, no shoes, no service"]; 2.) It has to bear an individual's body weight comfortably. If an individual can either not wear socially acceptable foot wear, or cannot bear his body weight comfortably, the foot is a liability. As radical as this recommendation may sound, the appropriate treatment in this case would be a below-knee amputation. Individuals with BKA are extraordinarily functional and comfortable. But since Mr. Stephenson appears to be enjoying the opportunity to use his foot to completely disable himself, I doubt he would ever consider the next treatment step for his left foot complaints.

With respect to his right knee, Mr. Stephenson has clinical signs of an incompetent ACL. This would typically result in chondromalacia patella as well as possible degenerative changes within the medical compartment or medial meniscus. Appropriate treatment for the right knee at this point would be an arthroscopic examination and debridement of the joint. While Mr. Stephenson implies that his right knee problems are a result of his altered gait from the left heel, and walking on crutches, I find this extraordinarily implausible. According to the amount he says he is able to stand and walk, he would not possibly be ambulating enough to provoke any symptoms in his right knee.

Likewise, Mr. Stephenson would have me believe that his back problems are a result of his altered gait. Again, by his report, he is nowhere near sufficiently active for an altered gait to provoke what appears to be an otherwise normal back. Appropriate treatment for his current complaints would include obtaining a lumbar MRI. Any further treatment could depend upon the result of that study.¹¹

Dr. MacMillan rated claimant with a 0 percent to the low back (DRE I) for his complaints of pain and further concluded there was no physiological abnormality that caused claimant's heel pain. Finally, he testified that plantar fasciitis is an idiopathic condition that just develops over time in certain individuals, generally without any

⁹ This essentially means that claimant has a torn right anterior cruciate ligament.

¹⁰ MacMillan Depo., Ex. 2 at 2 (Aug. 26, 2004 Report).

¹¹ *Id.*, Ex. 2 at 3 (Aug. 26, 2004 Report).

identifiable source.¹² And thus he opined that claimant's job duties did not cause his left foot or heel pain.

Claimant was evaluated by two vocational specialists. He first saw Jerry Hardin on July 12, 2004. Mr. Hardin itemized 28 unduplicated tasks over claimant's 15 year work history. According to Mr. Hardin, considering the reports of Drs. Murati and Winslow, claimant has a 100 percent task loss and was and is essentially and realistically unemployable, and unable to obtain or perform substantial gainful employment and should be on Social Security.¹³ He indicated that if claimant were allowed to work it would have to be a sheltered position where a family member hired him to do a sit down job.

Claimant was also evaluated by Steve Benjamin on December 22, 2004. Mr. Benjamin identified 52 tasks in claimant's relevant work history. He went on to conclude that claimant should be able to re-enter the open labor market in a sedentary position and earn approximately \$395.70 which would not constitute a significant wage loss as his post-injury wage was \$380.60.

Claimant stated that presently both sitting and walking causes him pain. He has not worked since March of 2002, and has made no effort to locate employment since that time.

The ALJ concluded claimant suffered a series of accidental injuries culminating on March 2, 2002 and the Board agrees with that finding. An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁵

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the

¹² *Id.* at 16.

¹³ Hardin Depo., Ex. 3 at 6.

¹⁴ K.S.A. 44-501(a).

¹⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹⁶

Under these facts and circumstances, the Board is persuaded that claimant suffered an accidental injury arising out of and in the course of his employment. The nature of his job kept him on his feet for extended periods of time. Although two physicians indicate plantar fasciitis is an idiopathic condition, even Dr. Winslow testified that work aggravated claimant's symptoms. And the Board is persuaded by his testimony on that issue. Thus, the Board finds that claimant did indeed meet his burden of establishing he sustained an accidental injury arising out of and in the course of his employment with respondent.

The ALJ assessed a 21 percent permanent partial impairment to the lower leg based upon the opinion expressed by Dr. Murati. However, she declined to assess any further permanency to either claimant's right leg or his low back which would have entitled him to a permanent partial general body disability under K.S.A. 44-510e(a). The Board has carefully considered the medical testimony on this issue and concludes the ALJ's finding should be affirmed, albeit with the modification (pursuant to the parties' stipulation) that the 21 percent is to be at the level of the foot rather than the lower leg.

Only Dr. Murati concludes that claimant's right knee and low back conditions are causally related to his left foot diagnosis and that they qualify for a rating under the *Guides*. Yet, like the ALJ, the Board is not persuaded that claimant's right knee or low back complaints are the result of his left foot complaints. Claimant did not complain of right knee and low back problems until May 2003 when he saw Dr. Murati. Even then, he is referred for an examination with Dr. Winslow and the tests that are performed reveal no objective findings to either area. The record is clear that claimant did not tear his ACL while working for respondent. Rather, the condition of his ACL in his right knee is abnormal, and was not caused by work or his work-related foot condition. Moreover, the osteoarthritis in his right knee was not caused or aggravated by work or his altered gait. Similarly, the fact that claimant has no objective findings relating to his back pain as well as Dr. Winslow's opinion that claimant was neurologically intact justify the ALJ's decision to limit claimant's recovery to the functional impairment of a scheduled injury to the left foot. Accordingly, the Board affirms the ALJ's Award in a manner consistent with the parties' stipulation that the 21 percent is to the foot.

¹⁶ *Id.*

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 1, 2005, is affirmed and clarified:

The claimant is entitled to 79.72 weeks of temporary total disability compensation at the rate of \$253.75 per week in the amount of \$20,228.95 followed by 9.51 weeks of permanent partial disability compensation, at the rate of \$253.75 per week, in the amount of \$2,413.16 for a 21 percent loss of use of the left foot, making a total award of \$22,642.11.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
John D. Jurcyk, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director